No. 77-601

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE FOUKE COMPANY, PETITIONER

v.

ANIMAL WELFARE INSTITUTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. The Marine Mammal Protection Act, 86 Stat. 1027, 16 U.S.C. (Supp. V) 1361 *et seq.*, imposes a moratorium on the taking[1] or importation of marine mammals or marine mammal products (16 U.S.C. (Supp. V) 1371(a)). The moratorium can be waived by the Secretary of Commerce on specified conditions, which require among other things a determination that the waiver is compatible with the Act and "in accord with sound principles of resource protection and conservation" (16 U.S.C. (Supp. V) 1371(a)(3)(A)).

Waiving the moratorium is a two-stage process. The Secretary must first promulgate regulations setting forth the terms of the waiver (16 U.S.C. (Supp. V) 1373) and may then issue permits, consistent with the regulations, authorizing

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[1]The term "take" is defined in the Act (16 U.S.C. (Supp. V) 1362(13)) as meaning "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal."

particular applicants to take or import animals (16 U.S.C. (Supp. V) 1374). Whether or not there has been a waiver, the Act makes it unlawful to import any marine mammal that was "nursing at the time of taking, or less than eight months old, whichever occurs later" (16 U.S.C. (Supp. V) 1372 (b)(2)).

In 1975, petitioner, the Fouke Company, sought a waiver and permit to import sealskins from South Africa. In February 1976, the Director of the National Marine Fisheries Service, to whom the Secretary's waiver authority under the Act had been delegated, determined to waive the moratorium. The waiver would permit the importation of up to 19,180 skins of Cape fur seals "harvested" in the Republic of South Africa, on the conditions that no more than 70,000 Cape fur seals are taken by that country in any one annual harvest, commencing in 1975, and that the skins do not come from seals that are nursing, pregnant, less than eight months old, or taken in a manner deemed inhumane by the Director (Pet. App. 55a-56a). The regulations implementing the waiver provided that "eight months old" means "eight months old as determined by using a mean birthdate for the Cape fur seal of December 1 for any one pupping season," and that "nursing" means "nursing which is obligatory for the physical health and survival of the nursing animal" (Pet. App. 84a-86a).

A permit was not granted to Fouke for the 1975 harvest because that harvest exceeded 70,000 animals. In the fall of 1976 Fouke again applied for a permit, this time to import some 13,000 sealskins from the 1976 harvest. The non-federal respondents, who are eight organizations interested in animal welfare (Pet. App. 68a, n. 2), submitted views urging that the permit be denied. The permit was granted, however, on December 15, 1976.

2. The respondent organizations then moved in the United States District Court for the District of Columbia for a temporary restraining order and preliminary

injunction preventing importation of the sealskins covered by the permit. The district court denied the motion and dismissed the suit, holding that respondent organizations lacked standing (Pet. App. 63a-66a).

On expedited appeal, the court of appeals reversed (Pet. App. 67a-92a). The court held that the provision of the Marine Mammal Protection Act (16 U.S.C. (Supp. V) 1374(d)(6)) authorizing "any party opposed to such permit" to obtain judicial review in a United States District Court "of the terms and conditions of any permit issued by the Secretary" under the Act conferred standing on the respondent organizations to challenge the permit and the related regulations (Pet. App. 72a-74a). The court further concluded that even aside from this statutory provision, the respondent organizations had demonstrated standing by showing injury in fact to "recreational, aesthetic, scientific and educational interests of their members" that was caused by the agency's actions, and by showing that their interests were within the zone of interests intended to be protected by the Act (Pet. App. 75a-83a).

Proceeding to the merits of respondents' claims, the court held invalid under the Act the regulation defining "eight months old" in terms of a mean birth date of December 1 for any one pupping season. Noting that the annual pupping season is during November and December and that 50 percent of the new seals are born by December 1 (Pet. App. 84a), while the annual harvest is assumed to begin on August 1 (Pet. App. 21a-23a and n. 20), the court held that the government's decision to allow "fully *half* the seals imported to be *less than* eight months old when killed * * * is so far from meeting the statutory standard that it must be rejected" (Pet. App. 84a-85a (emphasis in original)).

With respect to the statutory ban on importation of skins from animals that were "nursing at the time of taking," the court similarly held that the regulation limiting "nursing" to nursing which is necessary for the animal's health and survival, as distinguished from nursing for "convenience" at a later age, impermissibly narrowed "the unambiguous command of the statute" (Pet. App. 85a-88a). The court further concluded (Pet. App. 89a-90a) that because of the shortcomings of the South African seal harvest with respect to both the age limitation and the nursing provision, the Secretary could not permissibly certify that the harvest was consistent with the provisions and policies of the Act, as he was required to do by 16 U.S.C. (Supp. V) 1371(a)(3)(A).

3. The questions presented by the petition are whether respondent organizations had standing to challenge the waiver decision and implementing regulations, and whether the court of appeals properly rejected the interpretation by the Department of Commerce of the statutory limitations on importing seals that were less than eight months old or nursing when taken.

The conclusion of the court of appeals that respondents had standing by virtue of the statutory provision (16 U.S.C. (Supp. V) 1374(d)(6)) was not, in our view, unreasonable, in the light of respondents' claims of injury and the broad language of the Act. See *Warth* v. *Seldin*, 422 U.S. 490, 501, 513-514; *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n. 3; *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205.

We believe, however, that the court of appeals should have accepted the Department's interpretation of the terms "eight months old" and "nursing." As the court acknowledged, it is impossible to avoid entirely the chance that a single sealskin might be imported from an

underage or nursing seal (Pet. App. 85a and n. 52, 88a and n. 60). The regulations interpreting these statutory terms, developed by the agency that is charged with administering the statutory scheme and is expressly directed by Congress to prescribe such regulations on the basis of the best scientific evidence available to it (16 U.S.C. (Supp. V) 1373), reflected reasonable judgments.[2] They should have been upheld by the court. *Udall* v. *Tallman*, 380 U.S. 1, 16.

Nevertheless, the United States did not petition for certiorari in this case because it is our view that the decision below will have little impact on the administration of the Marine Mammal Protection Act beyond the present case. The terms "less than eight months old" and "nursing" appear in the Act only in connection with restrictions on the importation of marine mammals for purposes other than scientific research (16 U.S.C. (Supp. V) 1372(b)(2)). The waiver granted to petitioner with respect to South African fur seal skins is the only waiver issued to date that is subject to those restrictions and that even arguably involves animals that were less than eight months old or still nursing when killed.[3] And no application has been made for a comparable waiver that might raise either of these issues.

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[2]The court of appeals determined that the regulations permitted "half the sealskins imported to be from underage seals" (Pet. App. 85a). This would be the case, however, only if the entire harvest were carried out on the first day of the season, August 1. But "sealing continues into October as a normal course" (Pet. App. 22a), and the Department accordingly estimated that, even assuming that the harvest begins on August 1 (in 1975 it began on August 4, Pet. App. 21a), the percentage of the total seals killed that were over eight months of age might be 70 percent (Pet. App. 22a, n. 20).

[3]Petitioner is the only company that has applied for a permit under the waiver that was granted for South African fur seals.

Should the petition be granted, the United States will, however, defend the validity of the Department's regulations.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.